

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
STEPHEN ELLIOT, :  
: 18-CV-5680 (LDH) (SJB)  
Plaintiff, :  
: January 5, 2021  
:  
v. : Brooklyn, New York  
:  
MOIRA DONEGAN, et al., :  
:  
Defendant. :  
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE SANKET J. BULSARA  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: NICHOLAS LEWIS, ESQ.

For the Defendant: JOSHUA MATZ, ESQ.

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1                   THE COURT: This is Judge Bulsara. We're  
2 here for a status conference/discovery motion  
3 conference in 18-5680.

4                   Who is here for the plaintiff?

5                   MR. LEWIS: For the plaintiff, Nicholas  
6 Lewis of Nesenoff & Milternberg. Good afternoon, your  
7 Honor, and Happy New Year to your Honor and counsel.

8                   THE COURT: Good afternoon. Happy New Year.

9                   Who is here for the defendant?

10                  MR. MATZ: Good afternoon, your Honor. This  
11 is Joshua Matz from Kaplan Hecker & Fink, and I'm  
12 joined by my colleague, Martha Fitzgerald. We  
13 appreciate you being available, especially in the  
14 evening.

15                  THE COURT: Good afternoon. Well, the Court  
16 is always here. Evening doesn't start around here  
17 until like 9:00 p.m. So, you know, we'll keep calling  
18 it the afternoon for now.

19                  I have read the parties' letters. Let me  
20 ask at the outset, has there been a date scheduled for  
21 the deposition in this case?

22                  MR. LEWIS: Not yet, your Honor.

23                  MR. MATZ: No, your Honor, there has not  
24 been.

25                  THE COURT: Okay.

1                   MR. MATZ: The parties consulted about the  
2 date for the deposition, and Mr. Lewis indicated he  
3 wasn't available early next week. The latter half of  
4 this week is challenging for us and our client, so the  
5 parties had conspired in advance to ask if the Court  
6 might allow the deposition to occur at the end of next  
7 week.

8                   THE COURT: Yeah, I'm certainly happy to do  
9 that. I'm happy to extend the deadline to complete the  
10 depositions as necessary. Let me make a sort of  
11 general comment about the papers here. This is not a  
12 criticism, it's an observation. The Court is in a  
13 somewhat unusual and awkward position. It is the rare  
14 case that on a very granular level, I or any other  
15 judge is asked to draw the line of deposition inquiry  
16 prior to a deposition.

17                  Now, obviously, parties are encouraged to  
18 move for protective orders and clarification with  
19 regard to deposition and they often do, and that's not  
20 really what I'm talking about. Just in reading the  
21 papers, it occurs to me that, in some, not all, is not  
22 whether there are certain broad areas that ought to be  
23 off limits or not but rather whether what amounts to  
24 particular questions and very detailed questions should  
25 be answered or not. And that kind of line drawing

1 without the benefit of the actual question as phrased  
2 in the context of, whether it be a document or the  
3 questions that precede it and the answers to the  
4 questions that precede it, is a very difficult task.

5                 Usually -- I will say this -- when a court  
6 is asked to do that kind of line drawing, the  
7 restrictions end up harming one side or the other  
8 because those -- the Court doesn't have an actual Q-  
9 and-A, and it amounts to drawing something that can be  
10 either very over-inclusive or very under-inclusive.  
11 And I'm a little worried here that I'm being asked to  
12 do something somewhat in the abstract. I wonder, for  
13 some of these items, whether the parties really just  
14 need to take the deposition and if there's an  
15 instruction not to answer, there's an instruction not  
16 to answer and it can be taken up on a later date.

17                 I'm just making that as a general comment.  
18 You don't have to respond. Perhaps as we go through  
19 these various items that I'm being asked to tick  
20 through, I can highlight examples of this. This is a  
21 somewhat, I don't want to say dangerous but perilous  
22 exercise that the parties have asked me to engage in.

23                 So as we go through these various items, I  
24 encourage you to, perhaps as you respond, think about  
25 this broad comment that I'm making because I will say -

1 - I could be very wrong about this but the plaintiff is  
2 asking for very broad rulings on areas of inquiry,  
3 which in the context of an actual deposition, might be  
4 simply a single question or single set of questions  
5 that, in the context of a deposition, defendant's  
6 counsel might find wholly unobjectionable. And by  
7 asking for the advanced ruling, you're not even giving  
8 yourself that opportunity. You're potentially putting  
9 me in the position of saying, well, if I don't rule for  
10 you, you don't get to even go near that area, and  
11 that's the danger of doing it this way.

12 MR. LEWIS: I understand and certainly  
13 appreciate that, your Honor.

14 THE COURT: Look, you know, in another life,  
15 I would take and defend depositions all the time and,  
16 you know, if a question -- you know, I might be willing  
17 to let certain questions go forward because really  
18 ultimately, there's not a lot of there there for my  
19 client to answer those questions or it simply appears  
20 to follow naturally. If you're defending a deposition,  
21 you might let it go or, on the other side, you may  
22 realize that certain areas are just simply not worth  
23 spending your time on. But you're asking for these  
24 very broad pronouncements that are often very difficult  
25 to pin down in the absence of an actual phrased

1 question.

2 MR. LEWIS: May I comment on that, your  
3 Honor. This is Nick Lewis for the plaintiff.

4 THE COURT: You may.

5 MR. LEWIS: Thank you. Certainly this is  
6 somewhat of a new exercise for me as well. I think the  
7 -- I can only speak for plaintiff's side. From the  
8 perspective of this being sort of a gating issue  
9 discovery and then more so the timing of when discovery  
10 was winding down. I frankly was fearful just that  
11 going through the deposition, as it had been playing  
12 out towards the end of the discovery deadline, that the  
13 one deposition I was going to have was going to be the  
14 sort of shot I had to question Ms. Donegan. So from  
15 just the timing of the sort of request ahead of  
16 schedule -- and these had been issues myself and  
17 opposing counsel had discussed. With regard to other  
18 areas of discovery, we've had a lot of meet and  
19 confers. But just from the timing ahead of schedule, I  
20 certainly -- if I knew there was going to sort of be  
21 another opportunity, after we litigate any specific  
22 question issues or a protective order, I think the  
23 normal route of going through the deposition and then  
24 having litigation if there was going to be a later  
25 deposition made sense to me. So the timing was --

1                   THE COURT: Right, I understand. Again, I'm  
2 just making an observation.

3                   MR. LEWIS: I understand.

4                   THE COURT: Some of the things -- and I say  
5 this to defendant's counsel, right, or to both of you.  
6 If a witness is told not to answer a question because  
7 the witness wants to -- or the lawyer actually feels  
8 that this is an area that shouldn't be explored, and at  
9 a later date, I or Judge D'Arcy Hall says the  
10 instruction not to answer was inappropriate or over-  
11 broad and shouldn't have been exercised here, your  
12 client -- the witness sometimes has to sit for a second  
13 deposition and you have to make the spur-of-the-moment  
14 decision, well, perhaps I'll give a little leeway here  
15 because I don't actually think the information is  
16 harmful and I'm not going to start conceding anything  
17 by letting you ask these questions.

18                  Let's take these areas one at a time and  
19 both of you can -- and all three of you can give me  
20 some clarity about what exactly is being sought. I  
21 will say, just sort of to Mr. Lewis, my rulings here  
22 are informed by a few things. One is -- first and  
23 foremost, Judge D'Arcy Hall's opinion. And although --  
24 and I think that means we are in the phase of the case  
25 of restricting discovery to a very narrow set of issues

1 and -- so if the case were to go forward, I do not see  
2 this as the only deposition that would take place of  
3 the defendant, but that's a big if. I'm not inclined  
4 to permit inquiry into areas that are beyond the  
5 narrowly-tailored issue that is before the Court and  
6 the limited discovery we're in.

7                   And I think, Mr. Matz, you can correct me if  
8 I'm wrong, but you would have to acknowledge that if  
9 you lose on the immunity and this case has to go  
10 forward to other phases of discovery, your client might  
11 have to be deposed.

12                  MR. MATZ: Of course, your Honor, and we  
13 have acknowledged that expressly in our conversations  
14 with Mr. Lewis.

15                  MR. LEWIS: Yes, he has.

16                  THE COURT: So, you know, I think -- look,  
17 obviously, they've made a strategic decision about that  
18 and I think -- so I'm informed by Judge D'Arcy Hall's  
19 opinion, I'm informed by the status of discovery and  
20 what the discovery should be about. I also do not  
21 believe -- maybe I'm repeating myself by saying Judge  
22 D'Arcy Hall's opinion. I don't believe discovery is a  
23 back end to expand or even really litigate the scope of  
24 the immunity on what the legal test is, so I'm really  
25 drawing on her opinion in making some of the judgments

1 I'm making here tonight.

2 Let me start with what I think is  
3 straightforward and easy. I shouldn't say easy, at  
4 least straightforward in my view. It appears that the  
5 parties do not agree on whether Ms. Donegan should be  
6 asked about her deletion of certain documents and duty  
7 to preserve them. I view that as beyond the scope of  
8 discovery that's been permitted. I understand that  
9 plaintiff may wish to pursue some kind of "sanctions"  
10 or other kind of inquiry.

11 Number one, at this stage, I don't think  
12 it's been established that the preservation obligation  
13 existed at the time plaintiffs believe it existed. But  
14 putting that aside, even if there was a preservation  
15 obligation, I don't view this deposition as the  
16 appropriate way to discern this information and I view  
17 it as beyond the permitted discovery, so I'm not going  
18 to permit that.

19 Then there is -- there's an issue which -- I  
20 don't know whether they're ships passing in the night.  
21 I'm working backwards from Mr. Matz's letter of  
22 December 29<sup>th</sup>.

23 Mr. Lewis, do you wish to ask Ms. Donegan  
24 about her knowledge of the veracity of the statements  
25 in the spreadsheet?

1                   MR. LEWIS: Well, I don't -- from my  
2 understanding, Ms. Donegan says she did not know Mr.  
3 Elliot as far as the allegations against him, so I  
4 don't believe we had actually -- in the sort of list I  
5 compiled, I don't believe that any questions before --  
6 I think if there are questions beyond whether she took  
7 any steps or didn't know whether she took any steps,  
8 not necessarily whether she knew or didn't know whether  
9 the statement was true but just whether she took any  
10 steps are the only questions of that nature that I  
11 would request that I be able to ask.

12                  THE COURT: How does whether she took steps  
13 to understand the veracity fit into the framework for  
14 the immunity question here?

15                  MR. LEWIS: If, for example, Ms. Donegan was  
16 aware of statements that were false that were being put  
17 into the spreadsheet and then whatever conduct she took  
18 after it circulated around or made comments on -- I  
19 think that's the conduct that could be seen as  
20 materially contributing to the unlawfulness of the  
21 allegation against Mr. Elliot.

22                  THE COURT: Well, I guess I still don't  
23 understand because the question of material  
24 contribution, for example, doesn't necessarily turn one  
25 way or the other as to whether or not the person who is

1 aware of the truth of the statement or not. In other  
2 words, if the inquiry is, did you contribute to  
3 defamatory meaning, isn't the question really one of  
4 alteration rather than truth?

5 MR. LEWIS: I think her conduct in general  
6 was relevant. I don't know if it's necessarily just  
7 alteration. I believe I said in my letter -- for  
8 example, I think an example of conduct that would be  
9 considered materially contributing to the unlawfulness  
10 would be in circulating the list that contained the  
11 allegations against Mr. Elliot. If Ms. Donegan  
12 circulated a list with her own comment, I do believe  
13 that would be materially contributing, even if she did  
14 not alter --

15 THE COURT: That may be, that may be. But,  
16 again, it's not a question of whether the spreadsheet  
17 was true or not, or more precisely --

18 MR. LEWIS: I understand, Judge.

19 THE COURT: -- whether she knew the  
20 statements in the spreadsheet were true or not. I  
21 mean, I understand the position that if you circulate  
22 the spreadsheet, you are making a material  
23 contribution. I understand that's your position, or  
24 even saying, fill this spreadsheet out. I'm not saying  
25 you're right about that but you don't need to know

1 what's filled in and whether it's truthful or not.

2 MR. LEWIS: I understand the Court's point.

3 THE COURT: To the extent that there are  
4 questions about the knowledge of the veracity of the  
5 statements on the spreadsheet, I find that those are  
6 beyond the scope of the deposition limits in the  
7 inquiry, so I am granting the protective order with  
8 respect to that.

9 Mr. Matz, anything you want to say on that  
10 point?

11 MR. MATZ: No, your Honor.

12 THE COURT: Okay. Then there are what I  
13 believe -- again, I'm just working backwards. The  
14 relevance of Ms. Donegan's interaction with specific  
15 third parties.

16 Mr. Matz, does your position change if I  
17 were to say that there can be inquiries about  
18 particular entries without the discussion of the names  
19 of the people in those entries? In other words, I'll  
20 give you an example. If there's a row that doesn't  
21 relate to Mr. Elliot and it's row number 12,  
22 hypothetically, and the questions were, do you recall  
23 who gave you the information or how you received the  
24 information relating to row 12, do you recall who gave  
25 it to you, when you received it, when the information

1 was -- questions along those lines, all of the answers  
2 to which -- none of which should be, you know, the  
3 actual name of the person. Then the question is, once  
4 you received that information, what if anything did you  
5 do with it?

6 Is that still problematic? In other words,  
7 if I permit questioning about other rows on the  
8 spreadsheet but do not permit and do not require  
9 questioning or answering whether you have any personal  
10 identifying information?

11 MR. MATZ: Your Honor, that is not something  
12 to which we would object. If I could just add one or  
13 two quick clarifications.

14 THE COURT: Sure.

15 MR. MATZ: To be clear, I actually -- in  
16 rereading the letters in advance of today's hearing, I  
17 was struck by the fact that I think there's more  
18 agreement than perhaps met the eye and that a fair  
19 amount of the disagreement comes down to the question  
20 that your Honor has identified, which is essentially  
21 the privacy interests of third parties and the extent  
22 to which Mr. Lewis could, consistent with the scope of  
23 Judge D'Arcy Hall's order, inquire about and obtain  
24 personal identifying information, the other aspect of  
25 which of course would be any entries that Ms. Donegan

1 herself may or may not have made into the spreadsheet.

2                 But what I take the Court to be saying is,  
3 if there is a row, Mr. Lewis could ask, you know, are  
4 you aware of -- in some cases, Ms. Donegan herself --  
5 just to clarify, in some cases, Ms. Donegan herself may  
6 have entered a name into the spreadsheet or may have  
7 entered an allegation. In other cases, someone else  
8 may have sent it to her and she might have entered it  
9 at their behest. In still other cases, a third party  
10 may have done it with no involvement whatsoever from  
11 Ms. Donegan.

12                 So presumably, what I take the Court to be  
13 asking is, if Mr. Lewis said, you know, in row 12, do  
14 you know how this person's name came to be there, do  
15 you know -- do you know the identity of the person who  
16 added the name or who added this allegation, and she  
17 would say yes or no, hypothetically, but she wouldn't  
18 actually give the personal identifying information and  
19 Mr. Lewis couldn't ask questions to suss out personal  
20 identifying information but could instead ask other  
21 questions relating to her knowledge or lack thereof of  
22 the provenance and the procedures that surrounded the  
23 inputting of non-Elliot allegations into the list?

24                 THE COURT: That is exactly what I am  
25 seeking to direct the parties to do.

1                   Mr. Lewis, is there an objection to  
2 proceeding that way?

3                   MR. LEWIS: No, your Honor.

4                   THE COURT: Okay. Mr. Matz, let me just say  
5 -- I'm assuming, in framing it the way you did for me,  
6 your client -- you and your client agree to that.

7                   MR. MATZ: Yes, your Honor.

8                   THE COURT: That's the limitation on the  
9 rows that do not relate to Mr. Elliot and that's how  
10 the questioning should proceed. I really don't want to  
11 get into -- Mr. Matz, you should warn your client  
12 appropriately but sometimes witnesses can blurt out  
13 information and then undo the effect of a protective  
14 order.

15                  I would rather us not have to get into those  
16 issues and, obviously, Mr. Lewis I'm confident is going  
17 to abide by the Court's instruction not to inquire  
18 about identifying information. But I have seen  
19 situations where a witness could err inadvertently and  
20 that can raise other issues. If that does happen, I'm  
21 going to direct that the deposition transcript be at  
22 least temporarily sealed, and we can deal with any  
23 issues of, what does that mean and is further inquiry  
24 permitted.

25                  MR. MATZ: Completely understood and

1 appreciated, your Honor, and we will counsel our client  
2 appropriately.

3 THE COURT: Okay. Mr. Lewis, I wonder if  
4 you have Mr. Matz's letter here, and I'm just going in  
5 the reverse order.

6 MR. LEWIS: I do, your Honor.

7 THE COURT: So I would also ask you at the  
8 end if there's anything that's not covered by his  
9 letter that you believe a ruling is appropriate or  
10 necessary for you here.

11 MR. LEWIS: Okay.

12 THE COURT: Mr. Matz, does what we just  
13 agreed to and that I incorporated into the limitations  
14 of the deposition, does that solve the issue that  
15 you've labeled second here or is there something I'm  
16 missing, which I see may be about whether or not Mr.  
17 Elliot's counsel is going to seek information about Ms.  
18 Donegan's own personal experience of sexual assault or  
19 harassment?

20 MR. MATZ: Your Honor, I believe it does --  
21 it does, your Honor. I believe that what you just said  
22 does address it in the following respect: Mr. Lewis  
23 presumably could not ask Ms. Donegan, tell me all of  
24 the names that you yourself entered here personally,  
25 nor could he ask her, point me to the allegations that

1 you entered on the basis of your own personal knowledge  
2 as to the non-Elliott cells.

3                   He could ask her, is it the case that you  
4 entered allegations into the spreadsheet, is it the  
5 case that you entered names into the spreadsheet, and  
6 he could ask more general questions about her practices  
7 and procedures in doing so. But he essentially  
8 couldn't -- he couldn't ask for the specifics, which  
9 would be -- that's at least what I understand the Court  
10 to be suggesting in terms of how the process that we  
11 just discussed would apply to the category labeled  
12 second, apart from what your Honor suggested was that  
13 one other issue, which Mr. Lewis had suggested and then  
14 withdrawn his suggestion. As you can imagine, out of a  
15 super-abundance of caution, we had hoped to ask the  
16 Court for clarity and confirmation that he will not  
17 question Ms. Donegan about her own experiences of  
18 sexual assault, abuse, or harassment, which couldn't  
19 possibly be relevant to the CDA immunity issue.

20                   THE COURT: Let's deal with that issue  
21 first.

22                   Mr. Lewis, I'm assuming that you're not  
23 going to ask Ms. Donegan those questions, namely about  
24 her own personal experiences with sexual assault,  
25 abuse, or harassment.

1 MR. LEWIS: No, your Honor, I never -- I did  
2 not intend to.

3 THE COURT: And I'm not casting aspersions,  
4 I'm simply just confirming, okay, so that's great.

5 Mr. Matz, I'm a little confused and perhaps  
6 I misunderstood. I may be oversimplifying but  
7 certainly, Mr. Lewis, under what we just agreed and  
8 what I would enter, couldn't say, well, give me the  
9 names of the people who you collected information from  
10 or give me the names of the people whose information  
11 was -- who provided information to you, or if I tell  
12 you a name, please connect that to a particular row on  
13 the spreadsheet.

14                   But what I'm a little uncertain about with  
15 the two examples you gave is -- and I'm going back to  
16 my row 12 example. Are you saying that you would like  
17 a limitation that said, okay, looking at the  
18 information for row 12, who are the allegations about?  
19 He certainly couldn't ask that unless it's somehow  
20 unredacted or not -- and it was just a verification,  
21 for example. Putting that aside, but he could ask, do  
22 you recall who gave you information about an alleged  
23 sexual assault committed by this person? Ms. Donegan  
24 either does or doesn't remember.

25 If she does remember, how did you obtain

1 that information, and could ask, what did you do with  
2 it after you obtained it? Did you alter it in any way,  
3 did you blah, blah, blah, and could do that on a row-  
4 by-row basis or entry-by-entry basis. Perhaps at a  
5 certain point, it's redundant but in order to establish  
6 the process for how the spreadsheet came to be, you  
7 know, I think Mr. Lewis would be permitted to ask about  
8 content relating -- other than specific to Mr. Elliot,  
9 in order to verify or understand how the information  
10 specifically related to Mr. Elliot -- the content there  
11 was altered or not altered.

12 MR. MATZ: Yes, your Honor, and I realized  
13 as you were responding that there's actually a bit of  
14 ambiguity here, and the reason why is that there are  
15 essentially two respects in which Ms. Donegan may have  
16 entered an entry into the spreadsheet. Broadly  
17 speaking, she could have been doing it because she  
18 herself had had an experience with the person, so she  
19 was giving a first-person account, and that may or may  
20 not be the case as to certain entries.

21 In the alternative, it may not have been  
22 first person. She might have received information from  
23 a third party and the direction to add it to the  
24 spreadsheet. I had been thinking of the first category  
25 and I realized as you were speaking that you were

1 thinking of the second.

2 THE COURT: Yes. So then if that's the  
3 case, I think are you able to identity -- Mr. Lewis can  
4 certainly ask to confirm on the record at the  
5 deposition which of the rows relate to information  
6 provided by a third party. The reason I say it this  
7 way is, also, there is -- there is a little bit of  
8 factual and legal danger perhaps to the immunity  
9 defense unless you're crystal clear about how you're  
10 drawing the line about what you're permitting inquiry  
11 into in this area.

12 If there are entries that relate  
13 specifically to Ms. Donegan's own experiences, are you  
14 saying in analyzing the immunity attendant to the  
15 spreadsheet, those entries should not be considered at  
16 all because it's not -- because that's what I think  
17 you're asking for at that point.

18 MR. MATZ: Yes, and I feel comfortable  
19 asking for it because I have a wall of authority,  
20 including multiple Second Circuit opinions, that would  
21 support that position. I also have, perhaps even more  
22 advantageously, Judge D'Arcy Hall's opinion, which  
23 refers --

24 THE COURT: Before I get to that -- but I  
25 think that requires you to tell Mr. Lewis which of

1 those portions of the spreadsheet you are drawing that  
2 box around, if that makes sense. In other words,  
3 otherwise, he can't conduct the deposition. In other  
4 words, it may be that the content that she contributed,  
5 to the extent there is any, that relate to her own  
6 experiences is not relevant to the community analysis.  
7 And as you indicate, Judge D'Arcy Hall's opinion says  
8 -- in a certain section -- don't you have to identify,  
9 so that Mr. Lewis knows not to go there with those  
10 questions?

11 MR. MATZ: I completely understand the  
12 Court's point and if I can, let me try to explain our  
13 thinking. CDA immunity is always assessed on a  
14 statement-by-statement basis. So the only ground on  
15 which Ms. Donegan could lose CDA immunity is if there  
16 were a showing that she had created or developed the  
17 content in Mr. Elliot's entries. As Mr. Lewis is well  
18 aware, there is no evidence supporting the fact that  
19 she did and there is evidence supporting the conclusion  
20 that she didn't.

21 As to the other cells on the spreadsheet,  
22 whether she would have entered a first-hand account  
23 potentially or whether she instead may have entered  
24 information at the behest of a third party in my mind  
25 would not in fact be relevant to assessing whether she

1 has a CDA immunity defense as to the statements in Mr.  
2 Elliot's cells because unless Mr. Lewis could establish  
3 that, notwithstanding the fact that she has testified  
4 that she had never met Mr. Elliot and had no idea who  
5 he was, that she had created or developed the specific  
6 alleged defamatory statements in his cells would simply  
7 not bear on the CDA immunity question.

8 THE COURT: Well --

9 MR. MATZ: And so --

10 THE COURT: I understand that. Let me ask  
11 you to think about the following, though, right, which  
12 is -- again, you know, my job here isn't at this point  
13 to figure out who's right or wrong or decide the merits  
14 in any way, but one can imagine a situation that, in  
15 order to question or respond to the statement that I  
16 didn't create the information in -- I didn't alter or  
17 create the information related to Mr. Elliot's entry.  
18 It would certainly bear on the credibility of that  
19 assertion whether or not the same thing was done with  
20 respect to people she also did not know, right?

21 In other words, it wouldn't be the first  
22 time that someone tries to cross-examine an assertion  
23 by saying, is this what you did in the other instances  
24 or not? Look, I realize that puts you in a difficult  
25 position but that's a virtually impossible line to

1 draw, and arguably an unfair one to the plaintiff here,  
2 not to be able to test that assertion with respect to  
3 what I'll call similarly situated cells, in other words  
4 individuals unknown to her or that don't relate to her  
5 experiences. I don't know how you expect that -- I  
6 recognize that it is a statement-by-statement inquiry.  
7 I'm not disagreeing with you on that.

8 MR. MATZ: Understood, your Honor. I  
9 suppose I have two thoughts in reaction.

10 THE COURT: Sure, and I have a proposed  
11 solution after you go ahead. Go ahead first.

12 MR. MATZ: Great. So what I'm going to try  
13 to do is propose two solutions, and then you can tell  
14 me whether either of them make sense or whether the  
15 Court would instead adopt a different one because I'm  
16 trying to be solution-oriented.

17 So one approach -- this is an approach that  
18 we suggested in our letter -- is that instead of asking  
19 by cell by cell -- and I'll say candidly that based on  
20 my conversations with Ms. Donegan, I think Mr. Lewis  
21 may be disappointed at her line-by-line recollection of  
22 what happened in a twelve-hour period over three years  
23 ago. But one approach --

24 THE COURT: Which is why I said -- sorry to  
25 interrupt -- which is why I said at the beginning, some

1 of these questions are academic -- without doing them  
2 before the deposition makes it, you know -- raises  
3 issues that might not otherwise be raised, but go  
4 ahead.

5 MR. MATZ: I completely agree with that and  
6 I think our position and Mr. Lewis' position were  
7 closer than they may have seemed because what we had  
8 said is that he should feel free to ask, in general  
9 terms, how she responded whenever she received  
10 information from a third party for entry into the  
11 spreadsheet. What we had not suggested was that he  
12 could literally go line by line in a manner that would  
13 make apparent to him which if any entries were entered  
14 on the basis of Ms. Donegan's own first-hand  
15 experiences. But we had tried to get about as close to  
16 that as we could, in a manner that would still allow  
17 him to ask the pattern-and-practice-type questions that  
18 I understand the Court to be identifying as reasonable  
19 for purposes of assessing the CDA immunity issue.

20 If we call that approach one, which was the  
21 approach that we suggested in our letter, an  
22 alternative approach which would be consistent with  
23 what the Court described just a minute ago would be to  
24 allow that line-by-line questioning. But in that case,  
25 we would -- as the Court may understand, our client has

1 rather serious concerns about being publicly identified  
2 as having authored any other particular individual name  
3 or allegation, especially given that they relate to --  
4 they would relate to, you know, personally traumatic  
5 experiences and could not in any respect themselves  
6 bear on the CDA immunity issue, and she has testified  
7 that she did not -- was not the source for Mr. Elliot's  
8 entry and indeed had no idea who he was.

9                 For that reason, if the Court were to adopt  
10 an approach modeled on the one that it described, what  
11 we would request is a particularly robust redaction or  
12 protective order such that nobody other than Mr. Lewis  
13 and the Court could know those names or identities and  
14 they would otherwise be concealed and kept private,  
15 since they are -- since that information would be both  
16 irrelevant and extremely disproportionate to the needs  
17 of an assessment of the CDA immunity issue.

18                 THE COURT: So I am -- perhaps this is --  
19 let me say at the outset, I will permit proposed  
20 redactions and sealing, to the extent it even has to be  
21 publicly filed, along the lines you've indicated. I'm  
22 assuming Mr. Lewis would have no objection to that. I  
23 mean the parties, the press --

24                 MR. LEWIS: No, your Honor.

25                 THE COURT: -- may seek to undo that but at

1       least in the first instance, I'm fine with having, to  
2       the extent it's required and the parties agree upon it,  
3       those portions that we've just discussed redacted. Is  
4       Mr. Lewis okay with that?

5                    MR. LEWIS: Yes, your Honor.

6                    THE COURT: Let me say the following,  
7       though. Mr. Matz, what I was suggesting was -- again,  
8       this may be too simplistic, right, is you could just  
9       simply tell Mr. Lewis in advance of the deposition  
10      which entries he should ask about and which ones he  
11      should not.

12                  MR. MATZ: Understood, your Honor. So that  
13      would be a sort of counsel-to-counsel communication  
14      that we would be both keep confidential.

15                  THE COURT: Yeah, and that's outside of the  
16      deposition. I mean, it's not -- look, because also,  
17      frankly, it's efficient to do that. I'm assuming that  
18      Mr. Lewis does not want to spend time asking about rows  
19      themselves that do not bear upon the pattern and  
20      practice because it's not information received from  
21      somebody else, so he doesn't want to waste time on  
22      that, I assume. So I think, putting aside the privacy  
23      interests, et cetera, I think it's just more efficient,  
24      and that's what I mean about drawing a box around what  
25      should be asked and what should not be asked about.

1                   Let's put it this way: I'm not going to  
2 direct counsel to talk to each other about -- make an  
3 agreement, but I would encourage discussion along those  
4 lines and certainly in the first instance, I will  
5 permit, to the extent that something needs to be -- the  
6 deposition transcript even need be filed, the  
7 redactions and a protective order as appropriate.  
8 Obviously, you know, someone may come in and challenge  
9 those.

10                  I'll also say, you know -- I hate making  
11 these kind of advanced rulings but Mr. Lewis -- look,  
12 at a certain point, the questioning becomes redundant  
13 and, although rare, runs into a 403 problem for being  
14 redundant and unnecessary. So while you don't strictly  
15 apply the rules of evidence in a deposition, you  
16 certainly apply the Rule 30 limitations and a global  
17 question of whether Ms. Donegan has a recollection of  
18 any particular cells may obviate, you know, a line-by-  
19 line inquiry and may frankly save you time to go on to  
20 other things. So I'll just leave it at that.

21                  MR. LEWIS: If I might just clarify, your  
22 Honor.

23                  THE COURT: Yes.

24                  MR. LEWIS: So just regarding the  
25 information that these cells or these rows are rows in

1 which Ms. Donegan input them but without speaking to  
2 third parties, would that be the way in which these  
3 rows would be highlighted? That's the only part that  
4 I'm a bit unclear on, as to which -- how they would be  
5 identified and described by Mr. Matz.

6 THE COURT: He doesn't have to -- I'm not  
7 directing him to. I'm saying he could do that.

8 MR. LEWIS: Okay.

9 THE COURT: In other words, he could say,  
10 these are the rows that, you know, you're not going to  
11 get that relate to information that was provided by  
12 third parties, these are the ones that are not related  
13 to third parties, and you can use your time as you  
14 wish. It allows you to explore pattern and practice  
15 but you don't run afoul, even inadvertently, then of  
16 asking about rows that are off limits.

17 Mr. Matz, is that clear?

18 MR. MATZ: It is, and we -- I personally  
19 appreciate -- I appreciate the -- I appreciate the care  
20 with which the Court has analyzed an issue that  
21 presents perhaps unusual complexities and sensitivities  
22 and has done so in advance of the deposition, where  
23 those can be resolved in a more concrete, factual  
24 posture.

25 THE COURT: No need to thank the Court. We

1 just rule and roll with it and see what happens, but I  
2 appreciate it anyway. Let me ask you this:

3 Mr. Lewis, there's an item discussed in Mr.  
4 Matz's letter as 1 or first. Is that still at issue?

5 MR. LEWIS: Your Honor, it does not seem so.  
6 It's my understanding that there will be some  
7 questioning permitted as to these rows that are not Mr.  
8 Elliot's, so I believe that -- well, your Honor, I  
9 guess one -- I'm sorry, this would not be in one. So  
10 no, I think that's not an issue. The questioning your  
11 Honor just described would cover that issue as well, as  
12 far as I understand it. So it's my understanding --

13 THE COURT: Just to be clear, first refers  
14 to the legal inquiry for CDA immunity, and the factual  
15 inquiry is about other rows but not what the standard  
16 is, so I don't need to decide anything here from your  
17 perspective. Is that -- is that accurate. I'm  
18 obviously going to ask Mr. Matz the same thing.

19 MR. LEWIS: No, that's -- I believe that's  
20 correct, your Honor.

21 THE COURT: Okay. Mr. Matz?

22 MR. MATZ: Your Honor, we agree for purposes  
23 of the deposition.

24 THE COURT: Okay.

25 MR. MATZ: Whatever disagreements we have

1 with Mr. Lewis about CDA immunity, it sounds like, in  
2 terms of the areas of inquiry that are properly at  
3 issue, there's enough agreement to proceed.

4 THE COURT: Okay. I also felt like during  
5 the course of the discussion here, the parties are  
6 using very similar language as to what the standard is  
7 or what the inquiry is about, and I'll just simply say  
8 also for both of you, as in many cases, cases are built  
9 on the facts, and questions about what did someone do  
10 and how did they do it are more impactful and helpful  
11 on a motion than questions that ask, with legal  
12 language buried in them -- in other words, questions  
13 saying, did you materially alter the spreadsheet or the  
14 contents, it's not going to be as helpful as what did  
15 you do and when did you do it, because I think the  
16 facts will determine whether the legal test is met.

17 I gave up the task of taking depositions so,  
18 Mr. Lewis, I'll leave you to it.

19 MR. LEWIS: Thank you, your Honor.

20 THE COURT: Anything else from your side,  
21 Mr. Lewis?

22 MR. LEWIS: So just to clarify, your Honor,  
23 just from the standpoint of, what did you do, how did  
24 you do it, it's my understanding that just the  
25 questions of -- I know for example, the highlighting

1 and categorizing -- like in questions such as, did you  
2 highlight this row, would be an acceptable question as  
3 far as I understand it. That's just --

4 THE COURT: Before I determine -- Mr. Matz,  
5 are you going to object to that question?

6 MR. MATZ: Not only will we not object but  
7 as Mr. Lewis should know from reading the letter we  
8 sent him and submitted to the Court, we're okay with  
9 that line of questioning.

10 THE COURT: That's what I would -- Mr.  
11 Lewis, given what I've said this evening --

12 MR. LEWIS: Right.

13 THE COURT: -- I think it would be before if  
14 he were going to object, to draw that line, and he's  
15 indicating he's not going to. I mean, I think --

16 MR. LEWIS: Yes, sir.

17 THE COURT: Which is why I raised the point  
18 I did at the beginning, that perhaps the deposition  
19 itself will be clarifying as to what will be permitted  
20 or not be permitted. Okay, anything else from your  
21 side?

22 MR. LEWIS: Your Honor, if I might just --  
23 may I make one comment just regarding the deletion? I  
24 certainly won't take up a lot of the Court's time. I  
25 understand the Court's position but if I might just

1 make one comment regarding Ms. Donegan's deletion.

2 THE COURT: Sure. You'll have to refresh  
3 exactly what you mean.

4 MR. LEWIS: Sure, yes, sir. So, your Honor,  
5 regarding the questions about Ms. Donegan's deletion in  
6 the context --

7 THE COURT: Oh, the sanctions -- the  
8 sanctions context, yes, go ahead, I'm sorry.

9 MR. LEWIS: Just to the extent that Judge  
10 D'Arcy Hall's opinion is I guess contributing to that  
11 ruling, Ms. Donegan's deletion is a fact that I think  
12 is -- would not have been within the Court's -- within  
13 the Court's knowledge or within the motion to dismiss  
14 decision. The duty arose as to when preserving any of  
15 this evidence would have been a duty assigned to Ms.  
16 Donegan. I just wanted to insure that the Court  
17 received the email and affidavit that were sent under  
18 seal pursuant to the confidentiality order in which Ms.  
19 Donegan --

20 THE COURT: I did, and let me be clear about  
21 my ruling about this, which I think obviates some of  
22 this. There is always occasion at the end of a case  
23 for a party to, you know, seek a sanction. And  
24 usually, someone has to lay some factual predicate for  
25 that. But there's also the question of whether or not

1 a sanction is appropriate because the prejudice exists  
2 or not. I was merely trying to kick down the road any  
3 discussion of sanctions. I mean, there's a question in  
4 my mind -- if Ms. Donegan is immune, okay, and Judge  
5 D'Arcy Hall decides that immunity applies here, whether  
6 or not any sanction would be appropriate even if there  
7 was an improper deletion. So I would rather not go  
8 down these various sanctions routes if entirely  
9 unnecessarily, I suppose.

10 I do think -- in other words, you know, I  
11 guess what appears to be, and maybe I misrecalled --  
12 it appears undisputed that the real, live, electronic  
13 version of this no longer exists. Is that correct?

14 MR. LEWIS: Yes, your Honor.

15 THE COURT: Meaning the spreadsheet itself.  
16 And it's not in Google's possession, which I think was  
17 the whole subpoena practice.

18 Mr. Matz, I don't have the affidavits of  
19 your client and I'm going off recollection here, but I  
20 thought that you had communicated to Mr. Lewis or even  
21 perhaps to the Court about, perhaps orally even, that  
22 the spreadsheet doesn't exist and it was deleted at a  
23 certain point by your client or she never kept it. Is  
24 that right?

25 MR. MATZ: Yes, your Honor. Ms. Donegan, in

1 both her affidavit and her supplemental affidavit,  
2 which Mr. Lewis is in possession of, Ms. Donegan  
3 explains the circumstances surrounding her deletion of  
4 the Google spreadsheet. So that is a fact he's been  
5 aware of -- he's been aware of.

6 THE COURT: Okay. And I guess, look, Mr.  
7 Lewis, at that point, I think, you know, the question  
8 of going down these other avenues at the deposition --  
9 I'm not really sure why they would preclude you -- if I  
10 said, don't -- you can't ask these additional  
11 questions, why they preclude you in any way from making  
12 a sanctions motion at the end.

13 MR. LEWIS: But, your Honor, there would be  
14 relevant facts as to -- as to the sanctions decision  
15 that could be uncovered in the questioning of timing,  
16 for example, and the -- it was not only the list but  
17 also, it seems a great majority of the communications  
18 by Ms. Donegan. Being that it would -- the discussions  
19 about communications, certainly during the time the  
20 list was active and some brief period before, would be  
21 relevant.

22 If Ms. Donegan is going to rely on for  
23 example the absence of communications in which she  
24 explicitly encourages a third party or a group of third  
25 parties to contribute to the list, I would say that the

1       sanctions would very much come into play within the  
2       immunity discussion or the immunity determination by  
3       the Court, and whether or not the spoliation is found,  
4       that might preclude certain arguments or positions to  
5       be taken by Ms. Donegan in her defense.

6                   THE COURT: I think we may be talking about  
7       two different things, right? I mean, look, obviously,  
8       there is the kind of sword and the shield problem that  
9       if someone were to rely on the lack of communication  
10      about someone having deleted the communications, you  
11      know, it would be -- it could raise a problem.

12                  Mr. Matz, this is where it sort of alludes  
13      to what I was saying at the beginning. Your drawing  
14      the line here, right, for questions you might otherwise  
15      let your client answer, might cut off arguments you  
16      might want to assert.

17                  MR. MATZ: Your Honor, we appreciate that.  
18       I mean, look, we believed that we had a meritorious  
19       motion to dismiss, and Judge D'Arcy Hall, she was the  
20       one who directed narrowly tailoring discovery on the  
21       CDA immunity issue. Obviously, we believe that we will  
22       have a meritorious, targeted summary judgment motion on  
23       that ground. We appreciate that there are other issues  
24       in the case and that, by virtue of compliance with  
25       Judge D'Arcy Hall's order respecting CDA immunity,

1 lines of inquiry or topics that may bear on other  
2 aspects of the case won't be addressed at this stage  
3 and that, you know, there's at least some conceivable  
4 circumstances in which CDA immunity issues might  
5 overlap with issues that are relevant elsewhere.

6 But at the end of the day, all we're trying  
7 to do is comply with Judge D'Arcy Hall's order, and  
8 that's why our position has consistently been that we  
9 should do what she asks, which is have discovery,  
10 narrowly-tailored discovery focused on the CDA immunity  
11 issues and then targeted summary judgment practice on  
12 that ground, which we have always believed and continue  
13 to believe is just dispositive of the allegations  
14 against our client.

15 THE COURT: Let me ask you this: Are you --  
16 are you going to rely on the absence of communications  
17 regarding Mr. Elliot as a means of bolstering or in  
18 support of, I should say, the immunity defense?

19 MR. MATZ: Your Honor, we appreciate that  
20 the CDA immunity, as Judge D'Arcy Hall explained, is an  
21 affirmative defense. She has testified at length that  
22 she did not. We intend to rely on her testimony and  
23 there is a -- there is a document -- there are several  
24 hundred pages of documents that we have provided to Mr.  
25 Lewis. We will affirmatively rely on those to the

1 extent that they are relevant because we believe they  
2 further support our position.

3 THE COURT: Look, Mr. Lewis, I think Mr.  
4 Matz -- it's obviously very hard -- the summary  
5 judgment briefing isn't before me, the 56.1 statement  
6 hasn't been filed. But, obviously, if someone makes an  
7 argument and you think, well, I don't have access to  
8 those documents and therefore I couldn't rebut it, you  
9 can certainly make those arguments. I'm not sure why  
10 that entitles you at this point, though, to go down  
11 these other avenues as a means of rebutting sanctions  
12 on something that hasn't even been asserted yet.

13 In other words, taking sanctions broadly to  
14 mean spoliation, which is basically a way of saying,  
15 listen, you can't have the benefit of CDA immunity --  
16 you can't have the benefit of your argument because I  
17 didn't get access to discovery that directly bears on  
18 it or the discovery that directly bears on it was  
19 destroyed by your client after she had an obligation to  
20 preserve it.

21 At this point, I'm not going to -- I'm going  
22 to reiterate my ruling. I'm not going to permit  
23 inquiry into those areas, and that's certainly at Ms.  
24 Donegan's request. Certainly if, down the line, Mr.  
25 Matz wants to permit inquiry into that area, he can

1 (ui). But also, by requesting that line and having the  
2 Court draw that line, obviously, then he can't both  
3 take the benefit of it and not prevent access to  
4 discovery about it.

5                 But at this point, I don't -- you know,  
6 there's nothing to indicate to me that they're making  
7 the kind of argument that you've intimated. If they  
8 do, obviously, they could run into some complications.  
9 So I'm in a position of having to issue a kind of broad  
10 ruling in this area. So at this point, I'm not going  
11 to permit inquiry into spoliation issues. Obviously,  
12 if that becomes pertinent and a motion is made and  
13 someone has to sit for another deposition or an  
14 argument can't be made, those are consequences of  
15 having the lines drawn on both sides.

16                 MR. LEWIS: I guess, your Honor, my only  
17 concern is, this would be -- as discovery is going to  
18 end very shortly after -- a matter of days after Ms.  
19 Donegan's deposition, this unfortunately would be the  
20 only time in which further information that would be  
21 relevant to that would be -- just given the nature of  
22 if CDA immunity is found, then there won't be further  
23 discovery into -- inquiry into whether Ms. Donegan --

24                 THE COURT: At that point -- well, if CDA  
25 immunity exists, then we run into questions at that

1 point of, what are the sanctions based on and why would  
2 I impose a sanction for no prejudice, particularly in  
3 the area where you're trying to give breathing space to  
4 First Amendment concerns, right? So I'm not sure what  
5 the sanction would be. So now you're talking about the  
6 other kind of sanction.

7 If you're saying, look, summary judgment  
8 will be filed and at that point, if they meet arguments  
9 based on communications which they themselves claim  
10 that they have deleted and I wasn't allowed to inquire  
11 as to why they deleted, et cetera, number one, you can  
12 still make the argument, hey, they can't get the  
13 benefit of the argument because they didn't permit  
14 discovery into it and they deleted it. You saw when  
15 the deletions happened, so I don't know why you still  
16 can't make the argument. I don't know why I need to  
17 expand the scope of the deposition.

18 Number two, you wouldn't be the first party  
19 in the world to seek to expand discovery and make a  
20 56(d), if I've got that right, opposition to summary  
21 judgment and say, listen, more discovery needs to  
22 happen. At this point, it's somewhat theoretical and I  
23 take -- Mr. Matz I think acknowledges and understands  
24 that the lines that are being drawn may require  
25 depositions in the future. Particularly if CDA

1 immunity doesn't exist, there's a deposition on a whole  
2 manner of topics. Okay, anything else on your end?

3 MR. LEWIS: Yes, your Honor, I'm sorry, I  
4 recognize it's late. I just have one other -- just to  
5 clarify. I of course understand the identity of third  
6 parties who shared information regarding sexual  
7 harassment are certainly off limits from an asking  
8 standpoint.

9 Regarding individuals if any that Ms.  
10 Donegan spoke with or collaborated with in actually  
11 creating the list or circulating the list, is plaintiff  
12 able to inquire into any communications or individuals  
13 who -- not regarding whether they had shared  
14 allegations of sexual assault or harassment, in other  
15 words Ms. Donegan, but just their identities of people  
16 whom she communicating with and corroborated with in  
17 creating the list. Are those avenues permissible for  
18 inquiry?

19 THE COURT: At a future point, they could  
20 be. But unless I hear something otherwise, I don't  
21 know why -- for instance, as to circulation and  
22 distribution, it seems to me that goes to a question of  
23 a potential -- issue of publication and/or damages. I  
24 don't see a connection to the immunity question.

25 The question is, whether it's the role

1 relating to Mr. Elliot or the roles of other people, I  
2 don't know why you need -- certainly with respect to  
3 roles relating to other people, I don't know why you  
4 need the identity. In other words, why you couldn't do  
5 the deposition by simply asking, do you recall who gave  
6 you this information, was it more than one person, how  
7 many people was it, did you speak with them, did you  
8 email with them?

9 MR. LEWIS: Okay, so non-specific.

10 THE COURT: Right, without using their name.  
11 I don't know why you need to use their name for the  
12 purposes of immunity.

13 MR. LEWIS: Right, I understand.

14 THE COURT: Okay. Is there anything else?

15 MR. LEWIS: I do not believe so, your Honor.  
16 I'm just going through the list.

17 THE COURT: Okay. Let me ask Mr. Matz and  
18 I'll come back to you.

19 MR. LEWIS: Sure.

20 THE COURT: Mr. Matz, anything else?  
21 Anything on your side?

22 MR. MATZ: No, your Honor, and we appreciate  
23 the Court's attention to these issues.

24 THE COURT: Okay.

25 MR. LEWIS: Yes, thank you very much, your

1 Honor.

2 THE COURT: Mr. Lewis?

3 MR. LEWIS: Yes, thank you, your Honor,  
4 especially for the late call and the Court's time  
5 certainly.

6 THE COURT: This is early for us. Anything  
7 else?

8 MR. LEWIS: I'm sure there's plenty of work  
9 to be done, of course.

10 THE COURT: Hearing nothing otherwise, I  
11 will extend the close of this limited period of  
12 discovery. Is until the end of next week sufficient or  
13 do you need more time than that?

14 MR. MATZ: I believe that would be  
15 sufficient, your Honor.

16 THE COURT: Okay. Mr. Lewis, that's fine?

17 MR. LEWIS: Yes, your Honor. So that's just  
18 for the date of the 15<sup>th</sup>.

19 THE COURT: The 15<sup>th</sup>.

20 MR. LEWIS: Okay, that's fine, your Honor,  
21 thank you.

22 THE COURT: All right. I wish everyone  
23 continued good health. Have a good night.

24 MR. LEWIS: Thank you, your Honor, you as  
25 well.

1 MR. MATZ: Thank you, your Honor.

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I certify that the foregoing is a correct  
transcript from the electronic sound recording of the  
proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "Elizabeth Barron".

ELIZABETH BARRON

January 11, 2021